The decision undermines the freedom of contract of parties who wish to choose the state law that governs their transactions and creates uncertainty about the enforceability of contractual choice-of-law provisions in this Circuit.

AFS also respectfully submits that the panel majority overlooked facts material to the outcome of these appeals. But the proper resolution of the choice-of-law issue will obviate those factual issues and avoid the conflict with principles of federalism and comity created the majority's decision. On the other hand, if the Court determines that it should address those matters, then AFS requests that rehearing be granted and that the Court certify questions of Maryland law and public policy to the Maryland Court of Appeals.[1]

SUMMARY OF FACTS AND PROCEDURAL HISTORY

As the dissent observes (Dissent at 25), the majority's decision finds or assumes facts against AFS even though the case was decided below on motions to dismiss.

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[1] Certifying questions to the highest state court upon rehearing is permissible. *See, e.g., Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1221-22 (7th Cir. 1993); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327 (5th Cir. 1985). It is especially appropriate where, as here, the panel majority has rested its decision on State law and public policy which the District Court did not address and the parties did not brief in either Court. *See* discussion *infra*.

Lease Auditing and AFS's Audit Contracts

When this litigation began, AFS had six employees and was in the business of providing lease audit services for tenants in commercial buildings, including factory outlet malls. The tenants are typically large retailers or affiliates wholly owned by them, including "Anne Klein Factory Stores, Inc., Corning Revere Factory Stores, Publisher's Warehouse, and Lechter's." Dissent at 25. Appellees Prime Retail, Inc. *et al.* (collectively, "Prime") are owners and managers of such malls throughout the United States, including California, Maryland, and at least sixteen other States.

Typically, the leases between Prime and its tenants obligate the tenants to pay, in addition to base rent, certain operating expenses, known as "common area maintenance" or "CAM" charges. The leases also allow Prime to collect monies for certain "reserves." Under the leases, the tenants are permitted to audit those charges. This is important because of the manner in which tenants are billed for CAM charges and reserves. The mall manager incurs or forecasts hundreds of expenses for the entire facility and "accrues" them into various broad accounting categories. It then divides the total charges in each category among the tenants, usually on a square footage basis, and invoices the tenants accordingly. The tenant seldom, if ever, sees what it is paying for other than in summary statements and similarly conclusory "reconciliation statements" at the end of the year. Absent audits, the tenants cannot be certain that the charges are proper.

In the usual case, audits will reveal various errors and discrepancies and occasionally overly aggressive interpretations of lease terms. But usually each tenant's claims for overcharges at a particular mall during a given audit period are relatively small in amount. Thus, most tenants do not find it economical to conduct their own audits. But AFS, by auditing for several tenants in the same facility and conducting a single audit for the entire facility, makes the right to audit meaningful and practicable for the tenants.

Because overcharges found are usually relatively small, many tenants are unwilling to hire auditors on an hourly basis. Thus, AFS and other companies offer their services for compensation contingent on the amount actually recovered. And because the compensation is contingent on actual recovery, and not merely on the preparation of a report, the auditor commonly takes an assignment of the tenants' claims for any overcharges discovered. The assignments are also attractive to the tenants because they are in ongoing business relationships with their landlords. If suit should be necessary to collect overcharges, the tenant may prefer that the suit not be prosecuted in its name or by it directly, but rather by AFS. Further, AFS bears all expenses incurred in any litigation it commences – putting its own money where its audit report is.

Because the tenant's relationship with its landlord is frequently critical to the tenant's business, most audit contracts allow the tenant to terminate the audit engagement before it is completed. It may do so by paying a "cancellation fee," usually stated in the contract as a percentage of the "discrepancy" demonstrated by the audit, but in practice, a smaller amount is typically

negotiated at the time of the termination. (A tenant terminating the contract need not accept the overcharges or their magnitude as reported by AFS.) "Cancellation fees" tend to approximate reimbursement for AFS' expenses and some measure of *quantum meruit* for AFS' efforts, rather than the kind of fee which the panel majority (at 12) felt created a "Hobson's Choice" for the tenants.[2]

The Present Law Suit

In 1997, AFS conducted two audits of malls owned then or now owned by Prime. AFS discovered improper charges and reserve assessments which could not be explained as mere errors or even aggressive billing practices. AFS discovered regular and repeated efforts to conceal from the tenants the true nature of the charges they had paid. The evidence strongly suggested intentional schemes perpetrated over a period of at least four years and involving multiple victims which had lost collectively

[2] If this case had proceeded beyond motions to dismiss, AFS would have shown that the use of an intermediary to conduct audits and pursue recoveries is crucial to tenants who, in some commercial real estate markets, need to stay in the good graces of their landlords. Absent such intermediaries, the tenants do face a Hobson's Choice – between ensuring they are charged properly for expenses under their leases versus running the risk of losing the leases. For example, while AFS may be pressing a landlord on overcharges, the tenant may be starting negotiations for a new lease and, therefore, decide that the discrepancies found in AFS' audit should not be pursued, to avoid adversity, even indirectly, with the landlord at that delicate time. Alternatively, the tenant may be able to "wrap" the overcharges found by AFS into the economics of the new lease. In this fashion, AFS's audit contracts afford the tenants maximum flexibility, while still allowing AFS to perform a needed service and to be compensated fairly for that service.

tens of millions of dollars. It appeared that the pattern of fraudulent activity was part of Prime's routine business practices. Furthermore, when AFS' audit began to uncover the scheme, Prime acted surreptitiously to end the audit before it could be completed. This litigation ensued.

The District Court's Decision

Prime moved to dismiss AFS' action on various and alternative grounds. These included AFS' lack of real-party-in-interest status under Fed. R. Civ. P. 17(a) and lack of standing. While AFS believed (and still believes) that the original assignments in the audit contracts were legally effective, in response to the defense motion AFS secured from its audit clients a ratification of the assignments and of the filing of the suit. Each ratification stated:

> Company [*i.e.*, tenant] hereby confirms that it has conveyed to AFS title to the claims, in order to allow AFS to prosecute same solely in AFS's own name – without the Company joining in the Litigation or otherwise acting to recover on such claims – and without any expense or liability whatsoever on the Company's part. If and to the extent necessary to effectuate the Company's purpose in assigning to AFS the Assigned Claims, the Company hereby ratifies and consents to AFS' assertion and continued prosecution of those Assigned Claims in AFS' name, in accordance with the terms of the assignments. The Company also acknowledged that it is bound to the rules of procedure and discovery which govern the Litigation and that the Company is and will be bound to the final outcome and adjudication of the Assigned Claims.

While the District Court acknowledged that the Assignments and Ratification sufficed to make AFS the owner and real party in interest of the Assigned Claims, it nonetheless dismissed the claims on the grounds that the assignments were "champertous" under California law and constituted "witness contingency fee agreements." Therefore, the court held that AFS had no standing to prosecute the claims. AFS appealed.

This Court's Panel Decision

California has never recognized the interrelated doctrines of maintenance, champerty, barratry or their variations and has steadfastly refused to make them part of California law or public policy. *See, e.g.*, *Abbott Ford Inc. v. Superior Court*, 741 P.2d 124, 141 n.26, 885 (1987). Tacitly recognizing this, the panel majority applied Maryland law instead. To do so, it had to first overcome the choice-of-law clauses in the audit contracts in question here, which selected California law to govern the contracts. As explained below, the majority applied Maryland law by misapplying established Maryland choice-of-law principles, which embrace § 187 of the Restatement (Second) of Conflicts.

The majority then ruled that while Maryland too has determined that maintenance and its cousins are obsolete, it has "reserved" a generalized prohibition against "officious meddling" to cause others to assert claims "which they have no right to make." Op. at 13. The majority points to a 1908 Maryland criminal statute, Md. Code Ann. § 10-605(a), which it says codified the Maryland common law against certain forms of barratry, and though that statute, on its face, does not apply to AFS' audit

contracts (and the majority does not hold that it does), still the panel found that the statute reflects a general adherence in Maryland to barratry:

> [T]hrough surviving common law principles and statutory prohibition, the current fundamental public policy of Maryland prohibits schemes to stir up and promote litigation for the benefit of the promoter rather than for the benefit of the real party in interest. Any contract violating this policy is void in Maryland and will not be enforced by its courts.

Op. at 14.

Before turning to the grounds AFS believes warrant rehearing in this case, it is useful to take a closer look at the contracts in question and some important facts which the majority overlooked.

A Closer Look at the Contracts and the Majority's Reasoning

Because AFS cannot earn compensation unless it finds overcharges in the first place, its incentive to find overcharges and, according to the majority, to "trump up" claims and "stir up" litigation arises not with the assignments of the tenant's claims but with the audit itself. Indeed, the mischief which the majority condemns is theoretically possible even if AFS took no assignment of the tenants' claims but was compensated contingently from what the tenant recovered from the landlord. Although subtle, the inescapable point of the majority holding is that forensic accounting for a contingency fee is barratry and contrary to fundamental public policy. Yet, even if AFS were held to the standards of a certified public

accounting firm, its mode of business would be proper. Since 1990, as a result of action by the FTC, the standards of the AICPA have expressly recognized the propriety of doing forensic audits for a contingency fee. *See,* AFS's Supplemental Brief (11/16/01) at 7-9 and Standards there discussed, excerpted in Supp. App. 23-42. No Maryland statute, professional rule, case or other authority is to the contrary.

With respect to the assignment of claims, the dissent underscores the majority's evident assumption that AFS' contracts with its tenants are part of a scheme to propagate not only litigation but spurious litigation:

> [Under the audit contracts], [l]itigation is available as a last resort, and AFS has had to pursue litigation in relatively few cases. AFS's president, Mark S. Malen, confirms this in his *unrefuted* affidavit [reporting] that litigation has been required in less than 10% of the engagements for which we have been retained.

Dissent at 23-24 (emphasis in original). The majority not only overlooks those facts, it assumes contrary facts. But indeed the assignment of claims to AFS actually works against "trumped up" audits when they are performed for a contingent fee. Once AFS reports an overcharge to a client, it must pursue the recovery at its own expense unless the client cancels the engagement. As the dissent notes, "because AFS must bear the expenses of any unsuccessful litigation, it is unlikely that it would waste its resources on a pointless lawsuit." *Id.* at 25. AFS has no more incentive to report to a client groundless audit results, when doing so can accomplish little but to embroil AFS in an expensive and fruitless collection effort, than

does the auditor working for an hourly fee with no control over any litigation.

Also, AFS's audit contracts must be contrasted to the arrangement which the majority (at 14-15) espouses – that is, where "the tenants retain the right to prosecute [their claims] with the assistance of AFS[,]" while AFS provides "consulting services within its expertise" and is compensated by a percentage of what the tenant, rather than AFS, recovers. Op. at 15; *see also*, Op. at 8 n.2 and 12 n.4. Under this conception, the contingent fee auditor would have the same incentive to find discrepancies but would be undaunted by the cost to litigate them.

This leads to the majority's finding that the decision to sue is made by AFS unfettered by the tenant's judgment (except for the cancellation right) and is made solely for AFS' benefit. Those findings overlook the facts: (i) that in this case the tenants *did* exercise their judgment that the assigned claims should be pursued *after* the audit and indeed *after* AFS commenced suit, as they ratified the assignments in the District Court; (ii) that the cancellation right is not the Hobson's Choice the majority fears and was, in any event, bargained for by sophisticated business people hardly in need of special protections of the courts; and (iii) that the tenants receive between 50% and 60% of the net amount recovered on the assigned claims without incurring any litigation expense, inconveniences or risk whatsoever – hardly a "scheme[ ] to promote litigation for the benefit of [AFS] *rather than for the benefit of the [tenant] or the public.*" Op. at 14 (emphasis added). And unless one assumes that AFS is acting in bad faith, the majority overlooks the benefit to the tenants and to the public in ferreting out overreaching and fraud and preventing their repetition.

REASONS FOR GRANTING REHEARING OR REHEARING *EN BANC*

I. THE PANEL MAJORITY'S CHOICE OF LAW ANALYSIS VITIATES RESTATEMENT § 187

Neither side raised an issue on appeal as to whether Maryland law would oust California law, the law chosen by AFS and its clients to govern their contracts. Nevertheless, the majority ruled that the contractual choice of law could not apply.

A. Background on Choice of Law Problems

"Choice of law today, both the theory and practice of it, is universally said to be a disaster." William L. Reynolds, *The Silver Anniversary of the Second Conflicts Restatement: Legal Process and Choice of Law*, 56 Md. L. Rev. 1371 (1997). Critics have assailed the Restatement, and in particular § 187: "[T]he rule of section 187(2) has generated a raft of judicial decisions marked by confusion, temerity, and vacillation." Kirt O'Neil, Note, *Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 Tex. L. Rev. 1019, 1020 (1993). This Court has described the "fundamental policy" element of § 187 – the one on which the majority based its decision – as the "most vexing element of the *Restatement (Second)* formulation." *Barnes Group, Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1030 (4th Cir. 1983).

While Restatement § 187 may be imperfect, it is nevertheless the test that prevails among the States in this Circuit. *See, e.g., Torres v. McClain*, 535 S.E.2d 623, 625 (N.C. Ct. App. 2000); *Behr v. Behr*, 266 S.E.2d 393, 395 (N.C. Ct. App. 1980); *Lee v. Saliga*, 373 S.E.2d 345, 350

(W. Va. 1988); *Malpractice Research, Inc. v. Norman*, 24 Va. Cir. 118, 119-20 (1991); *Nat'l Glass, Inc. v. J.C. Penney Props., Inc.*, 650 A.2d 246, 248 (Md. 1994). This case presents an opportunity for the Court to clarify some of the ambiguities that hamper § 187 analyses, including those wrought by the panel majority's published opinion in this case.

B. The Majority Disregarded Two of the Three Elements of Restatement § 187.

As explained by the dissent, under § 187(2)(b):

> Three conditions must therefore be met before Maryland would reject California law on the ground that Maryland public policy is implicated. First, Maryland law must apply in the absence of an effective choice of law provision. Second, the California law must be contrary to a fundamental (or strong) public policy of Maryland. Third, Maryland must have a materially greater interest than California in the outcome of the particular issue, here, whether the assignments are legal.

Dissent at 19. Likewise, this Court has previously held that "Subsection (b) [of Section 187(2)] has *three requirements*" – the same three articulated in the dissent in this case. *Broadway & Seymour, Inc. v. Wyatt*, 944 F.2d 900 (unpublished table decision), 1991 U.S. App. Lexis 33801, *9 (4th Cir. Sept. 13, 1991).

The majority in this case, however, considered the "fundamental policy" element of Section 187 – and "never addresses the first and third conditions even though all three must be met under the Restatement rule adopted by

Maryland." (Op. at 19; Michael, J., dissenting). Not only is the majority's decision in conflict with other decisions in this Circuit, in Maryland and other states in the Circuit, its departure from established precedent here was outcome determinative.

If the majority had applied the first requirement of § 187(2)(b) – that Maryland law would apply in the absence of the choice of law provision – it would have had no basis for finding the requirement satisfied. AFS is based in California and its clients are headquartered throughout the United States, but none in Maryland. None of the audit contracts was made in Maryland. See Op. at 19-20.

The second requirement is that there be a "*strong* public policy against the enforcement of the foreign law in Maryland" (Op. at 20), something more than a difference in law. According to Maryland precedent and the dissent here:

> '[M]erely because Maryland law is dissimilar to the law of another jurisdiction does not render the latter contrary to Maryland public policy.' . . . [A]s far back as 1868 the Court of Appeals of Maryland noted that 'the common law notion of maintenance, as applicable to the assignments of rights of action, had become practically obsolete.' . . . Accordingly, no strong public policy against the California law allowing the assignments in this case can be gleaned from whatever, if anything, might remain of the common law doctrines of maintenance, champerty, and barratry in Maryland.

Op. at 20-21 (citations omitted). Maryland courts have not remotely evinced the strength of public policy against

"barratry" necessary to invalidate contracts valid in the place they were made.

Finally, on the third requirement, "it is evident that California has a materially greater interest in the outcome of this case than Maryland." Op. at 23. And as is true for the first prong of § 187(2)(b), the majority offers no analysis countering that conclusion.

In short, the majority's decision conflicts with the law upon which it purports to rely and with the decisions of this and other courts applying that law. And it invades the freedom of parties to contract and casts doubt on the efficacy of choice-of-law provisions they may put in their contracts – matters of exceptional importance warranting reconsideration of the majority's decision.

II. THE PANEL MAJORITY'S DECISION RAISES SERIOUS ISSUES OF FEDERALISM

Even if Restatement § 187 dictated the application of Maryland law, the majority's opinion should not be allowed to stand because it intrudes on Maryland's policy-making province. The Supreme Court has emphasized that articulating public policy is, absent congressional action, left by the Constitution to the States' legislatures. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 691-92. It is not to be determined *ad hoc* by judges, no matter how well-meaning. *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 138 (1960), *reh'g denied*, 393 U.S. 1045 (1969) ("public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives"). In *L&E Corp. v. Days Inns of America*, 992 F.2d 55

(4th Cir. 1993), this Court applied these principles in a freedom-of-contract context:

> It is the function of the court to construe the contract made by the parties, not to . . . to alter the contract they have made so as to conform it to the court's notion of the contract they should have made in view of the of the subject matter and the surrounding facts and circumstances . . . [G]eneral references to subjective notions of public policy cannot justify deviation from unambiguous contractual language. Public policy can only be implicated in the interpretation of a contractual agreement between private parties where it is 'explicit,' 'well-defined and dominant,' and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.

992 F.2d at 58 (citations omitted).

No reported decision in Maryland history has voided a contract for barratry. Maryland courts recognized shortly after the Civil War that barratry and its related doctrines were outdated holdovers from English law. *Schaferman v. O'Brien,* 28 Md. 565 (1868). As the majority observes, in 1908 Maryland did adopt a narrow statute prohibiting certain forms of barratry by lawyers and one form by non-lawyers, But as explained by the dissent, that statute, according to Maryland's courts, applies to non-lawyers only in cases of third-party solicitation, in the ordinary sense of that phrase, and even where solicitation for a service is for "personal gain" and even constitutes "officious meddling," it is not prohibited as barratry. Such "meddling" "does not make a permissive service barratry." *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 349 Md. 441, 459, 709 A. 2d 112, 121 (1998).

As the dissent here recognized, forensic auditing and the related services provided by AFS – even if increasing the likelihood of litigation – are unquestionably permissive services with legitimate business and commercial purposes. *See* Dissent at 23-26. Indeed, if the fee arrangement in the *Son* case was not barratrous or otherwise repugnant to Maryland public policy, it is inconceivable that the audit contracts in this case could be.

No reported decision by a Maryland court addresses whether arrangements like the contracts at here are barratrous or are otherwise illegal. If a federal court is to decide the issue, it must decide it as the State court would most likely decide it. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 418 (4th Cir. 1999). And in making such determination, the federal court "may seek guidance from all available sources, including decisions from other jurisdictions." *Id.*

While California never adopted the doctrines in question here, other states did – but subsequently abolished them. *E.g., Osprey, Inc. v. Cabana Limited Partnership*, 532 S.E.2d 269, 277 (S.C. 2000) ("we abolish champerty as a defense"); *Saldini v. Righellis*, 687 N.E.2d 1224, 1226 (1997) ("[T]he agreement . . . would be champertous were we to continue to recognize the offense. We no longer are inclined to do so."); *see generally*, Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (And Legal) Business*, 33 U. Mich. J. L. Reform 57 (1999-2000).

In *Bell County Board of Education v. Lee*, 39 S.W.2d 492 (Ky. 1931), the court upheld an agreement for auditing receipts of county officers in return for one third of any amount recovered as a result of the audits. "The mere fact

that the recovery of compensation is to be contingent upon the success of the suit is not sufficient to nullify the contract." 39 S.W.2d at 493. To the contrary, the Court found that enforcement of the agreement was in the public interest – to ensure that public officials "be held strictly to account and the courts look with favor upon all good-faith efforts seeking that end." *Id.*

Significantly, the action in *Bell* arose from defendant's refusal to act on plaintiff's audit. The court was not concerned, however, with the contingent recovery that so disturbed the majority here. In fact, the court held that plaintiff could "have his remedy by assuming the burden of first recovering the fund upon which his compensation is based." *Id.* at 496. The accountant was empowered to control the litigation leading to its recovery as a means of *furthering* the public interest, not violating it. *See also especially* and compare, *Temeron Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 325-26 (Okla. Ct. App. 1993); *see also generally, Sampliner v. Motion Picture Patent Co.*, 254 U.S. 233 (1920).[3]

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[3] As one commentator noted, "a variety of mechanisms are available to discourage [the] evils [of champerty], making a ban on champerty completely unnecessary." Martin, *supra*, at 83. These include causes of action for malicious prosecution and abuse of process and sanctions for the maintenance of frivolous suits. *Id.* As to the majority's second ground for voiding the contracts (Op. at 15), that "insofar as they provide for *expert* testimony for a contingent fee," AFS relies on the reasoning of the dissent. *See* Dissent at 26-27. Furthermore, the remedy for any ill perceived here is cross-examination of AFS' witnesses for bias and self-interest, not the voiding of contracts between sophisticated parties that are legal under the law of their formation. Finally, AFS agreed below and on appeal that if the Court believes AFS'

(Continued on following page)

Given the widespread consensus that the doctrines of maintenance, champerty and barratry long ago outlived their rationales, it is highly likely that, if faced squarely with the issue, a Maryland court would decline to void the contracts at issue here.

Finally, while the process may be uncommon, other circuits have granted rehearing *en banc* for the express purpose of invoking the certification procedure. *See, e.g., Todd v. Societe BIC, S.A.*, 9 F.3d 1216 (7th Cir. 1993) (*en banc*); see also note 1, *supra*. In *Todd*, the Seventh Circuit feared that the panel's decision on a state law question could encourage forum-shopping if federal and state interpretations diverged, and "the state [thus] loses the ability to develop or restate the principles that it believes should govern the category of cases. Certification then ensures that the law we apply is genuinely state law." *Todd*, 9 F.3d at 1222. The Court concluded that it was "far better to pose the questions to the only judges who can give definitive answers." *Id.*

CONCLUSION

The panel or the Court *en banc* should hold that in this case California law is not trumped by the public policy of Maryland and that, in any event, AFS' contracts with its clients do not violate Maryland public policy. If there is any doubt on the either issue, the panel or the Court may and should refer the issue to Maryland's highest court.

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employees should not testify as experts, then they will not. AFS will call independent experts at trial.

Dated this 12th day of August, 2002

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 18, 2002

NO. 00-1971
CA-99-2573-JFM

ACCRUED FINANCIAL SERVICES, INCORPORATED, for itself and as assignee of claims

Plaintiff-Appellant

v.

PRIME RETAIL, INCORPORATED; PRIME RETAIL, L.P.; PRIME RETAIL FINANCE, INCORPORATED; PRIME RETAIL FINANCE II, INCORPORATED; PRIME RETAIL FINANCE V, INCORPORATED; ARIZONA FACTORY SHOPS PARTNERSHIP; BEND FACTORY OUTLETS LIMITED PARTNERSHIP; BUCKEYE FACTORY SHOPS LIMITED PARTNERSHIP; CAROLINA FACTORY SHOPS LIMITED PARTNERSHIP; CASTLE ROCK FACTORY SHOPS PARTNERSHIP; CORAL ISLE FACTORY STORES LIMITED PARTNERSHIP; FLORIDA KEYS FACTORY SHOPS LIMITED PARTNERSHIP; GAINESVILLE FACTORY SHOPS LIMITED PARTNERSHIP; GROVE CITY FACTORY SHOPS PARTNERSHIP; GULF COAST FACTORY SHOPS LIMITED PARTNERSHIP; GULFPORT FACTORY SHOPS LIMITED PARTNERSHIP; HAGERSTOWN FACTORY SHOPS LIMITED PARTNERSHIP; HUNTLEY FACTORY SHOPS LIMITED PARTNERSHIP; INDIANAPOLIS FACTORY SHOPS LIMITED PARTNERSHIP; KANSAS CITY FACTORY OUTLETS LIMITED PARTNERSHIP; LATHAM FACTORY STORES LIMITED PARTNERSHIP; OUTLET VILLAGE OF LEBANON LIMITED PARTNERSHIP; LOVELAND FACTORY SHOPS LIMITED PARTNERSHIP; MAGNOLIA BLUFF FACTORY SHOPS LIMITED PARTNERSHIP;

MARKET STREET LIMITED; NEBRASKA CROSSING FACTORY SHOPS LIMITED PARTNERSHIP; NIAGARA INTERNATIONAL FACTORY OUTLETS LIMITED PARTNERSHIP; OAK CREEK FACTORY OUTLETS LIMITED PARTNERSHIP; OHIO FACTORY SHOPS PARTNERSHIP; OUTLET VILLAGE OF KITTERY LIMITED PARTNERSHIP; OXNARD FACTORY OUTLET PARTNERS; FACTORY OUTLETS AT POST FALLS LIMITED PARTNERSHIP; SAN MARCOS FACTORY STORES LIMITED; SHASTA OUTLET CENTER LIMITED PARTNERSHIP; TRIANGLE FACTORY STORES LIMITED PARTNERSHIP; HORIZON GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated; HORIZON GROUP PROPERTIES, INCORPORATED; HORIZON GROUP PROPERTIES, L.P.; FIRST HGI, INCORPORATED; SECOND HGI, INCORPORATED; THIRD HGI, L.L.C.; HGI PERRYVILLE, INCORPORATED, a/k/a Prime Outlets at Perryville Limited Partnership; HORIZON/GLEN OUTLET CENTERS LIMITED PARTNERSHIP, a/k/a Prime Retail, L.P.; FIRST HORIZON GROUP LIMITED PARTNERSHIP; SECOND HORIZON GROUP LIMITED PARTNERSHIP; THIRD HORIZON GROUP LIMITED PARTNERSHIP; H/G PERRYVILLE LIMITED PARTNERSHIP, a/k/a Prime Outlets at Perryville Limited Partnership; FINGER LAKES OUTLET CENTER, L.L.C.; HORIZON/GLEN GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated

Defendants-Appellees

NO: 01-1231
CA-00-2474-JFM

ACCRUED FINANCIAL SERVICES, INCORPORATED, for itself and as assignee of claims

Plaintiff-Appellant

v.

PRIME RETAIL, INCORPORATED; PRIME RETAIL, L.P.; PRIME RETAIL FINANCE, INCORPORATED; PRIME RETAIL FINANCE II, INCORPORATED; PRIME RETAIL FINANCE V, INCORPORATED; ARIZONA FACTORY SHOPS PARTNERSHIP; BEND FACTORY OUTLETS LIMITED PARTNERSHIP; BUCKEYE FACTORY SHOPS LIMITED PARTNERSHIP; CAROLINA FACTORY SHOPS LIMITED PARTNERSHIP; CASTLE ROCK FACTORY SHOPS PARTNERSHIP; CORAL ISLE FACTORY STORES LIMITED PARTNERSHIP; FLORIDA KEYS FACTORY SHOPS LIMITED PARTNERSHIP; GAINESVILLE FACTORY SHOPS LIMITED PARTNERSHIP; GROVE CITY FACTORY SHOPS PARTNERSHIP; GULF COAST FACTORY SHOPS LIMITED PARTNERSHIP; GULFPORT FACTORY SHOPS LIMITED PARTNERSHIP; HAGERSTOWN FACTORY SHOPS LIMITED PARTNERSHIP; HUNTLEY FACTORY SHOPS LIMITED PARTNERSHIP; INDIANAPOLIS FACTORY SHOPS LIMITED PARTNERSHIP; KANSAS CITY FACTORY OUTLETS LIMITED PARTNERSHIP; LATHAM FACTORY STORES LIMITED PARTNERSHIP; OUTLET VILLAGE OF LEBANON LIMITED PARTNERSHIP; LOVELAND FACTORY SHOPS LIMITED PARTNERSHIP; MAGNOLIA BLUFF FACTORY SHOPS LIMITED PARTNERSHIP; MARKET STREET LIMITED; NEBRASKA CROSSING FACTORY SHOPS LIMITED PARTNERSHIP; NIAGARA INTERNATIONAL FACTORY OUTLETS LIMITED PARTNERSHIP; OAK CREEK FACTORY OUTLETS LIMITED PARTNERSHIP; OHIO FACTORY SHOPS PARTNERSHIP; OUTLET VILLAGE OF KITTERY LIMITED PARTNERSHIP; OXNARD FACTORY OUTLET PARTNERS; FACTORY OUTLETS AT POST FALLS LIMITED PARTNERSHIP; SAN MARCOS FACTORY STORES LIMITED; SHASTA OUTLET CENTER LIMITED PARTNERSHIP; TRIANGLE FACTORY STORES LIMITED PARTNERSHIP; HORIZON GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated; HORIZON GROUP PROPERTIES, INCORPORATED; HORIZON GROUP PROPERTIES,

L.P.; FIRST HGI, INCORPORATED; SECOND HGI, INCORPORATED; THIRD HGI, L.L.C.; HGI PERRYVILLE, INCORPORATED, a/k/a Prime Outlets at Perryville Limited Partnership; HORIZON/GLEN OUTLET CENTERS LIMITED PARTNERSHIP, a/k/a Prime Retail, L.P.; FIRST HORIZON GROUP LIMITED PARTNERSHIP; SECOND HORIZON GROUP LIMITED PARTNERSHIP; THIRD HORIZON GROUP LIMITED PARTNERSHIP; H/G PERRYVILLE LIMITED PARTNERSHIP, a/k/a Prime Outlets at Perryville Limited Partnership; FINGER LAKES OUTLET CENTER, L.L.C.; HORIZON/GLEN GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated

Defendants-Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant has filed a petition for rehearing and rehearing en banc and a motion to certify questions of state law to the Maryland Court of Appeals. Appellees have filed responses in opposition to the petition and the motion.

Judge Michael voted to grant panel rehearing. Judges Niemeyer and Williams voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judges Widener, Michael, Traxler, and King voted to rehear the case en banc, and Chief Judge Wilkinson and Judges Wilkins, Luttig, Williams, Gregory, and Niemeyer voted against rehearing en banc. Judge Motz recused herself from all consideration of this case.

The Court denies the petition for rehearing and rehearing en banc. The Court further denies the motion to certify questions of state law to the Maryland Court of Appeals.

Entered at the direction of Judge Niemeyer for the the [sic] Court.

For the Court,

/s/ Patricia S. Connor
CLERK

CHRONOLOGY AND PROCEDURAL HISTORY OF LITIGATION BETWEEN PETITIONER ("AFS") AND RESPONDENTS ("PRIME PARTIES")

- On May 13, 1998, AFS sent a letter to the Prime Parties describing audit results, including overcharges and claims for relief to be asserted, including claims under the federal RICO statute, and requesting that within 10 days the parties' representatives meet in an effort to reach a pre-litigation settlement.

- On May 23, 1998, the Prime Parties commenced a declaratory judgment action in the Circuit Court for Queen Anne's County, Maryland, Case No. CV6575 seeking a determination that AFS cannot lawfully sue upon claims assigned to it by its audit clients ("the Queen Anne's Case").

- On June 18, 1998, AFS removed the Queen Anne's County Case to the U.S. District Court for the District of Maryland.

- On July 27, 1998 – and relying on the "bad faith" exception to the first-filed doctrine (see, e.g., *Capitol Records, Inc. v. Optical Recording Corp.*, 810 F. Supp. 1350, 1354 (S.D.N.Y. 1992); see also *Charles Schwab & Co., Inc. v. Duffy*, 1998 U.S. Dist. LEXIS 19606, at *4 (N.D. Cal. Dec. 8, 1998)) – AFS filed a civil action against the Prime Parties in U.S. District Court for the Central District of California, Case No. 98-6053, asserting two federal RICO claims and eight state-law claims (the "California Federal Action").

- On September 15, 1998, the U.S. District Court for the District of Maryland remanded the Queen Anne's County Case back to the Circuit Court in Queen Anne's County, Maryland.

- On July 1, 1999, the California Federal Action – upon motion by the Prime Parties filed in 1998 – was transferred to the U.S. District for the District of Maryland.

- On August 9, 1999, AFS voluntarily dismissed without prejudice the California Federal Action, then pending in the U.S. District for the District of Maryland, and simultaneously reasserted the same claims made in that action in a newly-filed civil action in the Circuit Court for the County of Baltimore, Maryland, Case No. 24-C-003851, (the "First Baltimore Case"), for the purpose of seeking to consolidate the Queen Anne's County Case with and into the First Baltimore Case, i.e., to bring all claims and controversies between the parties into a single case in which AFS would be the plaintiff.

- Before AFS could seek consolidation of the Queen Anne's County Case and the First Baltimore Case, the Prime Parties removed the latter action to the U.S. District Court for the District of Maryland, Case No. JFM 99 CV2573 (the "First Maryland Federal Action").

- On September 8, 1999, the Prime Parties moved to dismiss the First Maryland Federal Action on grounds, *inter alia*, that AFS lacks real-party-in-interest status and standing to sue on claims assigned to it by its audit clients, which motion was fully briefed and argued, including post-oral argument briefing, by January 28, 2000.

- On June 19, 2000, the U.S. District Court for the District of Maryland dismissed the First Maryland Federal Action on grounds that AFS lacked standing to sue on the claims assigned to it by its audit clients, and pursuant to 28 U.S.C. Section 1367(c), the court dismissed AFS's remaining claims – those which originated with AFS.

- On July 17, 2000, AFS filed its Notice of Appeal from the dismissal of the First Maryland Federal Action,

which was designated in the U.S. Court of Appeals for the Fourth Circuit as Appeal No. 00-1971.

- Contemporaneously with filing its Notice of Appeal from dismissal of the First Maryland Federal Action and pursuant to the Maryland "savings statute," Md. Rule (Civil Procedure) 2-101b, AFS refiled in the Circuit Court for the County of Baltimore Maryland (the "Second Baltimore Case"), Case No. 24-C-00-003614, reasserting the claims dismissed in the First Maryland Federal Action under 28 U.S.C. 1367(c) and, as a protective action and in light of doubts about statutes of limitations being tolled, the other claims that had been dismissed from the First Maryland Federal Action on grounds that AFS lacked standing to sue on those claims.

- On August 3, 2000, the Queen Anne's County Case was stayed pending resolution of the real-party-in-interest and standing issues raised by the Prime Parties in the First Maryland Federal Action.

- On August 15, 2000, the Prime Parties removed the Second Baltimore Case to the U.S. District Court for the District of Maryland (the "Second Maryland Federal Action") Case No. JFM-00-2474, which was assigned to the same District Court judge who had previously dismissed the First Maryland Action.

- In August 2000, the parties filed cross-motions in the Second Maryland Federal Action – AFS seeking a stay of that case, as a protective action until the then-pending appeal from the dismissal of the First Maryland Federal Action could be decided, and the Prime Parties seeking dismissal of the action with prejudice on grounds of *res judicata*, citing the prior dismissal of the same claims in the First Maryland Federal Action.

- On October 11, 2000, the U.S. District Court for the District of Maryland entered an order in the Second

Maryland Federal Action dismissing on res judicata grounds the nine claims for relief that had been previously dismissed from the First Maryland Federal Action on grounds that AFS lacked standing to sue on those claims and staying further proceedings on the two claims which had been dismissed from the First Maryland Federal Action under 28 U.S.C. 1367(c).

- On February 6, 2001, the U.S. District Court in the Second Maryland Federal Action granted AFS's motion to certify for immediate appeal under Fed. R. Civ. P. 54(b) the dismissal of nine of the eleven claims asserted in the Second Maryland Federal Action.

- On March 7, 2001, the U.S. Court of Appeals for the Fourth Circuit accepted for immediate appeal the partial dismissal of the Second Maryland Federal Case, and AFS thereupon filed a Notice of Appeal from that dismissal, which appeal was designated Appeal No. 01-1231 in the court of appeals.

- Thereafter, the U.S. Court of Appeals for the Fourth Circuit consolidated Appeal No. 00-1971 and Appeal No. 01-1231, the parties completed their briefing of the appeals, and on October 30, 2001 they presented oral argument to a three-judge panel of the court of appeals.

- After post-argument, supplemental briefing, the court of appeals, on July 29, 2002, and in a 2-1 decision, affirmed both final judgments challenged in the consolidated appeals.

- On August 12, 2002, AFS filed a timely petition for rehearing and rehearing *en banc*, together with a motion to certify questions of state law and policy to the Maryland Court of Appeals.

- On October 18, 2002, the court of appeals denied the petition for rehearing, and by a 6-4 vote of the active and participating judges of that court denied the petition for

rehearing *en banc*; the court also denied AFS's motion to certify questions of state law and public policy to the Maryland Court of Appeals.

STATE STATUTORY PROVISIONS

MD COURTS AND JUDICIAL PROCEEDINGS Code § 12-601 through § 12-609 (2002):

§ 12-601. Definitions:

(a) In general. – In this subtitle the following words have the meanings indicated.

(b) State. – "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(c) Tribe. – "Tribe" means a tribe, band, or village of Native Americans which is recognized by federal law or formally acknowledged by a state.

§ 12-602. Power to certify:

The Court of Appeals or the Court of Special Appeals of this State, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another state or of a tribe if:

(1) The pending litigation involves a question to be decided under the law of the other jurisdiction;

(2) The answer to the question may be determinative of an issue in the pending litigation; and

(3) The question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

§ 12-603. Power to answer:

The Court of Appeals of this State may answer a question of law certified to it by a court of the United States or by an appellate court of another state or of a tribe, if the

answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.

§ 12-604. Power to reformulate question:

The Court of Appeals of this State may reformulate a question of law certified to it.

§ 12-605. Certification order; record:

(a) Certification order. – The court certifying a question of law to the Court of Appeals of this State shall issue a certification order and forward it to the Court of Appeals of this State.

(b) Record. – Before responding to a certified question, the Court of Appeals of this State may require the certifying court to deliver all or part of its record to the court of Appeals of this State.

§ 12-606. Contents of certification order:

(a) In general. – A certification order shall contain:

(1) The question of law to be answered;

(2) The facts relevant to the question, showing fully the nature of the controversy out of which the question arose;

(3) A statement acknowledging that the Court of Appeals of this State, acting as the receiving court, may reformulate the question; and

(4) The names and addresses of counsel of record and parties appearing without counsel.

(b) Where parties unable to agree upon statement of facts. – If the parties cannot agree upon a statement

of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.

§ 12-607. Notice; response:

The Court of Appeals of this State, acting as a receiving court, shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable.

§ 12-608. Procedures:

(a) Maryland Rules. – After the Court of Appeals of this State has accepted a certified question, proceedings are governed by the Maryland Rules.

(b) Receiving state's rules. – Procedures for certification from this State to a receiving court are those provided in the rules and statutes of the receiving forum.

§ 12-609. Opinion:

The Court of Appeals of this State shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court, counsel of record, and parties appearing without counsel.